

THE LEGAL ASSISTANCE OFFICES OF
III CORPS, 1ST CAVALRY DIVISION, 4TH INFANTRY DIVISION (MECHANIZED)
FORT HOOD, TEXAS 76544

WILLS

I. INTRODUCTION - Your will is a written legal document providing for the disposition of your probate estate according to your wishes. Your probate estate consists of all of the property and personal belongings which you own or are entitled to possess at the time of your death that are not disposed of by other means, such as an insurance contract or a pay on death provision in a bank account.

II. REASONS TO HAVE A WILL -

A. *Intestate Distribution May Not Be What You Want* -When a person dies intestate, that is, without a will, the property of the deceased is distributed according to a formula fixed by state law. In other words, if you don't make a will, you don't have any say as to how your property will be divided. Take the case of a Texas resident dying without a will, for example. If this person dies without a will, leaving children who are not also children of the surviving spouse, the surviving spouse would share the estate with those children. Now usually a person would prefer that all of his estate, if it is not large, go to the surviving spouse. If there are any children under 18, the property cannot be delivered to them and a guardian must be appointed for them. A guardian will require considerable expense and could create legal problems that might have been avoided with a will.

B. *Real Property* - For Texans, anyone who owns real estate or other property held with a document of title, or who has an estate greater than \$50,000, generally should have a will.

C. *Minor Children* - Most people with minor children will want a will. Not only can a guardian and alternate guardian for minors be named in a will, but a trust for minors can be established. Naming a guardian simplifies the process of having a guardian appointed by the court and can save the expense of posting a bond. A trust ensures that money from the estate can be used for the benefit of any children and provides a mechanism for holding and administering money 'poured-over" from life insurance. Leaving money directly to a relative or trusted friend to provide for minor children, rather than establishing a trust, can cause unforeseen problems. For instance, if the person becomes incompetent, their guardian will be restricted, in most cases, to using the money for that person's benefit rather than for the children. Or worse, the money can become subject to the debts of the person named--including fees and debts resulting from law suits against them. In Texas, a married person who has children may need a will if they want their spouse to receive the whole estate. This is especially critical if they have at least one child who is not also the child of his or her spouse.

III. SIMPLE WILLS - Your Legal Assistance Office prepares only simple wills. If you have an estate worth over \$625,000, (a figure which will increase incrementally over the next several years to \$1,000,000), including life insurance benefits, then you should contact an attorney who specializes in estate planning. There are substantial federal gift and estate taxes on estates over \$625,000.

Even couples with assets less than \$625,000 may want to consult an estate planner. For instance, a spendthrift trust can protect a surviving spouse from the claims of creditors, including those resulting from law suits. Additionally, specific trusts may need to be established for incompetent adult children or other relatives. Contingent trusts for minor children, however, are routinely prepared and included in the simple wills prepared by most military legal offices. Be sure, though, to obtain the specific language for designating the trustee as beneficiary of life insurance if you want insurance proceeds to be paid into such a trust.

IV. PROPERTY THAT DOES NOT PASS BY WILL - Some property is normally not considered part of your probate estate and thus does not pass by will.

A. *Life Insurance* - Life insurance proceeds are usually not passed through your will, unless the policy is made payable to your estate. Life insurance is payable to the beneficiary named in the insurance policy. The proceeds of an insurance policy, however, are part of your estate for tax purposes under federal and most states laws.

B. *Right of Survivorship* - Property held with right of survivorship becomes the property of the survivor automatically, without the need for probating a will. In Texas, married couples can create a right of survivorship in all of their community property by written agreement. See your legal assistance attorney for details.

C. *Other Property* - Additionally, bank accounts may have been established with Pay On Death (POD) or other provisions that determine who is entitled to receive the money in an account regardless of the provisions of a will. Some investments and title to real property are often held with right of survivorship provisions that dispose of that property outside of the will. Real estate may also be affected by homestead rights that cannot be defeated by a will. Many retirement plans specifically designate beneficiaries. Therefore, before talking to an attorney about a will, you should do a survey of your assets and determine how they are titled and held and whether they will be disposed of outside of your will.

V. LEGAL RESIDENCE - Your legal residence is the state in which you have your true, fixed and permanent home and to which, if you are temporarily absent, you intend to return. Voting, paying taxes, owning property, motor vehicle registration and so on, are some indicators of one's legal residence. If you are a citizen of the United States, you must be a legal resident of some state. You cannot be a citizen at large. If you are a naturalized U. S. citizen, you are considered to be a resident of the

state in which you were naturalized. Your legal residence may affect where your will is probated and the amount of state inheritance or estate tax that may be paid at death.

VI. EXECUTOR/PERSONAL REPRESENTATIVE - An Executor (also called a personal representative in some states) is the person who will see that your estate is distributed according to the will. Because this person will often be required to file in your local Probate Court, it is preferable that the Executor live in or near the state where the bulk of your property is located. Your executor is entitled to receive a fee for his services out of the proceeds of the estate. He or she may also have to hire someone else (like a probate attorney) to meet the Probate Court's requirements. Those cost's are generally also paid out of the proceeds of your estate.

VII. SPECIFIC BEQUESTS - A Specific Bequest is a gift of a particular item to a certain person, charity, or corporation. You should describe the item with as much specificity as possible. In most cases, it is best to just leave the personal property as a whole to one or more persons (called beneficiaries). If more than one person, they can divide the property as they agree, or if they cannot agree, as your executor determines. You may also want to leave a letter of instruction.

VIII. NON-BINDING LETTER OF INSTRUCTION - A Letter of Instruction is not legally binding, but tells your heirs what you intended. For example, you may want a sister to get a certain ring that you own, even though she shares your total estate with other people. This can be accomplished simply by writing a list of each item and the person to whom you wish it be given.

Other instructions may include burial or cremation requests, nonbinding suggestions of how money is to be spent (such as for college or to benefit other relatives, etc.) or any other purpose you might have which you are willing to leave to the discretion of your executors and beneficiaries.

This letter should be attached with a paper clip to your will. It may be revised or discarded whenever you wish, without any formalities. A sample which you may use is available at your Legal Assistance Office.

IX. RESIDUARY ESTATE - The residuary estate is everything that you did not specifically give as a specific bequest or dispose of outside of the will. For most people, this is the bulk of their property. The First Beneficiary (or Beneficiaries) will receive everything (except your specific bequests). Generally, the Second Beneficiary gets nothing unless all the people listed as First Beneficiaries die before you do. Usually, your spouse is listed as the First Beneficiary and your children are listed as your Second Beneficiaries.

X. PER STIRPES VS. PER CAPITA - There are two ways to leave your estate to your children: Per Stirpes and Per Capita. For example, if you are not survived by your spouse but your are survived by two children, then each child would get 50% of your estate. Suppose one child died before you and left a child (your grandchild). If you want the deceased's child's share to be inherited by the grandchild, then the share passes per stirpes. If you want the surviving child to get the entire estate

(thus shutting out the deceased child's children), then the estate passes per capita. Feel free to discuss with the Legal Assistance Attorney the benefits of each scheme. If you do not indicate either, then we will assume you intend Per Stirpes distribution (as this is most common).

XI. SPECIAL CONCERNS REGARDING MINOR CHILDREN - There are two issues you should be concerned about if you die and your children are still minors: who will raise them (guardian), and who will handle the property or money (trustee) they inherit.

A. *Guardians* - The person you designate to raise your children should you and the children's other parent die, is called the Guardian. This person should be the person who will best take care of your children. Generally, the surviving natural parent will be determined to be the Guardian of his or her children unless there is a good reason to deny that parent guardianship. You may designate another person to be Guardian of your children in the event that the surviving natural parent is unfit or unable to be Guardian. Both parents should agree on the appointment of a guardian and substitute guardian. As an example, if the husband's will nominates his parents and the wife's nominates her parents and both husband and wife die at or about the same time, then the court will have to decide who is the proper party to be the children's guardian. That will cause undue hardship on all parties concerned as well as considerable unnecessary expense, a large part of which your estate will have to pay.

B. *Trustees* - If your children are minors, they are not able to have control over any money they inherit until they reach the age of majority (18) or any age after 18 that you deem appropriate. Until that time either the Guardian will handle their money for them, or a Trustee will handle the money for the children's benefit. In the case where the Guardian and Trustee are separate people, the Guardian must request permission from the Trustee to get money for the children. However, this may allow both sides of the children's family to stay involved and ensure that more than one person is involved in your children's welfare. Your trustee should be financially responsible and able to invest and manage money or willing to hire professional assistance (which cost will be paid from the trust funds).

C. *Types of Trusts* - Trusts provide a good method for coordinating your life insurance with your will, but you will usually have to do a change of beneficiary on your life insurance. Please ask your attorney for details on this.

(1) *Unitary Trust* - There are two types of trusts available in your Legal Assistance office. The first is called a single, unitary, or "pot" trust. This is where all the money goes into one "pot" for all the children until the youngest reaches a specified age, and then, if anything is left is divided free of trust in equal shares. This is most similar to what families do when the parents are alive, and best ensures that sufficient funds are available to meet the needs and expenses of all children, including the youngest.

(2) *Separate Trust* - The other type of trust is separate trusts. This is where the money is divided as of the day of your death, and the only money available for a particular child is the money in their trust fund. A guardian or trustee cannot take money from a sibling's (brother's or sister's) trust to meet a child's needs or extraordinary expenses. There may also be increased expense as each trust incurs separate costs of administration. This option is generally only best in large estates, or where there are children from more than one relationship and you are concerned that your trustee would not treat all the children fairly.

XII. CHANGING YOUR WILL - A properly drawn and executed will remains valid until it is changed or revoked. However, changes in circumstances after a will has been made, such as tax laws, marriage, birth of children or even a substantial change in the nature or amount of a person's estate, can affect whether your will is still adequate or whether your property will still pass in the manner you chose. Changes to a will are made by drafting a new will and destroying the old one, or by adding a "Codicil." A Codicil is a legal document which must be signed and executed in the same manner as your will. **NEVER MAKE ANY CHANGES TO YOUR WILL** without consulting an attorney. Changes on the face of your original will may make it invalid.

XIII. DISINHERITANCE - You are generally free to dispose of your estate as you wish. However, most states have laws which entitle spouses to at least part of the other spouse's estate. This "statutory share" ranges generally from 1/3 to 1/2 of the other spouse's estate. Some states, such as Louisiana, also provide shares of the estate to children of the decedent.

XIV. SUGGESTIONS REGARDING YOUR WILL

A. *Storage* - Only the original notarized will is legally sufficient to express your desires as to the disposition of your estate. Copies are not recognized by Probate Courts. It is therefore important that you safeguard your will and other legal documents.

The basic goal is to store your will in a place which is fireproof, secure, and where surviving relatives or friends may easily locate it and have ready access to it. Any place which meets these criteria would be adequate. Consider one or more of the following three locations for storage of your will, insurance policies, and other important documents:

(1) A safe deposit box in a financial institution in the State of Texas. Texas law allows removal of wills, insurance policies, and burial plot deeds from a safe deposit box in the presence of a bank officer or by order of a court. If your will is to be stored outside of Texas, an attorney in that state should be consulted for advice regarding safe deposit boxes.

(2) A safe or other fireproof, locking container in your home.

(3) Your life insurance company, which may offer the service of storing your will for you.

There are some additional safeguards you should take in order to ensure that your will is not lost or destroyed. Do not travel with your will on an aircraft. If the aircraft should crash your will may be lost or destroyed. You should also not ship your will or any other legal documents in your household goods or hold baggage; you run the risk of it being lost or destroyed during shipment or storage. If you are relocating or traveling and wish to safeguard your will during your travels or overseas assignment, then you may wish to store your will and other important legal documents in a safe deposit box or leave them with one of your personal representatives.

B. *Disposition of Any Previous and Obsolete Wills* - once you have had your will completed, executed, and notarized you should ensure that you destroy any and all previous will(s) being revoked. You do not want to have more than one will in existence at the same time.

C. *Copies* - Copies are not a legal substitute for the original Will. If you make a copy, cover the initials of the witnesses at the bottom of each page to prevent them from appearing on the copy. Next you should write "COPY" in large print on every page of the copy. Copies may cause legal problems for your survivors. You may choose to keep the copy for your personal reference, particularly if you do not have immediate access to the original. The only other people you should provide a copy to is your Personal Representative and children's guardian. You should do everything necessary to help your Personal Representative locate the original Will, if that becomes necessary.

XV. QUESTIONS - If you have questions or doubts regarding your will at any time, you are advised to consult any attorney regarding them. Any military legal assistance office will provide this service to eligible individuals (active duty soldiers and their dependents and retired service members and their dependents). If you are not eligible for legal assistance from a military legal assistance office in the future you should consult with a civilian attorney.

FOR ADDITIONAL INFORMATION CONTACT THE LEGAL ASSISTANCE OFFICES ON FORT HOOD: III Corps, Building 1001, Room C224, 287-7901/3199; 1st Cavalry Division, Building 28000, Room 1155, 287-6060; 4th Infantry Division (Mech), Building 410, Room 175, 287-1850.